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NO. 94084-3

SUPREME COURT OF THE STATE OF WASHINGTON

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES' ANSWER TO OTHER AMICI

ROBERT W. FERGUSON
Attorney General

EDWARD D. CALLOW
Assistant Attorney General
WSBA No. 30484
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-2854
Attorneys for Petitioner
Washington State Department
of Natural Resources

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I. INTRODUCTION

Several entities have filed amicus briefs in this matter. Most of the arguments that these amici make are addressed in the Department of Natural Resources' (DNR) Answer to Amicus Department of Ecology and Answer to Amici Georgia-Pacific and Sierra Pacific. In order to avoid duplication, DNR incorporates those arguments herein and offers an additional response to the specific arguments of the remaining amici that were not otherwise addressed by DNR. These remaining amici are: the Washington Environmental Council (WEC); the Cities of Seattle, Tacoma, Bellingham, and Washington Association of Municipal Attorneys (Seattle); the Skokomish Tribe (Tribe); and David Bricklin and Jolene Unsoeld (Bricklin).

Contrary to the arguments of amici, there are circumstances under which DNR could be potentially liable at other sites under the Model Toxics Control Act (MTCA). Indeed, as a "state government agency," DNR could have potential liability under some circumstances, but before any liability can attach, DNR must first fall under one of MTCA's categories of liable "persons" for a given site. *See* RCW 70.105D.040. In this case, DNR is not an "owner or operator" at Port Gamble under RCW 70.105D.020(22)(a), and therefore does not have liability at this site.

Amici are urging this Court to rewrite MTCA to say what it does not: that the State itself is a liable "person," and can be held liable as an "owner or operator" if one of its agencies has mere authority to control State-owned property, regardless of whether, or to what extent, that agency ever actually exercised such control. This is an absurd result that goes against the plain language of both RCW 70.105D.020(22)(a) and RCW 70.105D.040, as well as long-standing Washington precedent. The trial court correctly determined that DNR is not an "owner or operator" at Port Gamble, and accordingly this Court should decline to adopt amici's interpretation of MTCA, reverse the Court of Appeals, and affirm the trial court's decision.

II. ARGUMENT

A. DNR Does Not Dispute That as a State Agency, It Could Have Liability Under MTCA Under Some Circumstances. However, DNR Does Not Have Liability Under MTCA as an "Owner or Operator" at Port Gamble.

Contrary to the arguments of Amicus WEC and Amicus Seattle, DNR does not assert that it could never be liable under MTCA. Br. of Amicus WEC at 1, 5. Br. of Seattle at 7. Indeed, DNR does not dispute that as a "state government agency" it could, under some circumstances, have liability under MTCA. *See* RCW 70.105D.020(24); RCW 70.105D.040(1). However, as DNR has argued throughout this case,

it does not have any ownership interest in state-owned aquatic lands, and it did not exercise sufficient control at Port Gamble to be liable as an "operator" at that site. *See* DNR Suppl. Br. at 9-18.

MTCA establishes liability based on several categories of liable "persons." Those categories are listed under RCW 70.105D.040(1)(a)-(e) and include current or former owners or operators of a facility, arrangers, transporters, and certain sellers of hazardous substances. *Id.* As briefed extensively in this appeal, the term "owner or operator" is defined under RCW 70.105D.020(22)(a). If a state agency does not fall under one of these categories, it is not liable for cleanup costs at a facility. *See Seattle City Light v. Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999). DNR does not fall under the category of "owner or operator" at Port Gamble, and therefore is not liable at that site under MTCA.

Despite amicus Seattle's and WEC's representations,[1] a ruling in DNR's favor in this case would not exempt DNR from liability under MTCA in all circumstances. Indeed, DNR's "owner or operator" arguments only apply to state-owned aquatic lands, and there are multiple categories of liable "persons" that DNR could potentially fall under elsewhere. For example, the Department of Transportation (DOT) was found to be liable as an "arranger" in both *PacifiCorp Envtl. Remediation*

[1] Br. of Seattle at 7, Br. of WEC at 1, 5.

Co. v. Dep't of Transp., 162 Wn. App. 627, 634-39, 259 P.3d 1115 (2011) (DOT constructed and operated a drainage system that disposed of a hazardous substance in Commencement Bay) and *Seattle City Light,* 98 Wn. App. at 172 (DOT arranged for the disposal of a hazardous substance when it sold a contaminated tank car for scrap). This liability was based on DOT's direct involvement with the polluting activity, and its arranging for disposal of a hazardous substance. *Id.* Like DOT, depending on the nature of DNR's involvement in polluting activity on a given site, DNR could potentially be liable under MTCA under different factual circumstances than those here. Seattle's assertion that DNR could never be liable if the Court rules in its favor is simply false.[2]

Amici Seattle and WEC also argue that, if MTCA was intended to exempt state-owned aquatic lands, it would have explicitly done so, and that MTCA was intended to limit government liability, but not eliminate it. Br. of Seattle at 6-8; Br. of WEC at 5-6. DNR agrees that MTCA was intended to limit government liability, and one of the ways it does so is by excluding the State itself from its liability scheme.

[2] Seattle also reiterates that DNR's arguments belong in the allocation, and not the liability phase of this case. Br. of Seattle at 3. However, in order to apply the criteria of *Taliesen Corporation v. Razore Land Company*, 135 Wn. App. 106, 126, 144 P.3d 1185 (2006), and *Unigard Insurance Company v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), to evaluate DNR's "owner or operator" liability at Port Gamble, this Court must necessarily consider DNR's arguments in the liability phase of this case. *See* DNR Suppl. Br. at 15-16.

See RCW 70.105D.020(24). Indeed, MTCA creates such an exemption by focusing on "state government agenc[ies]" rather than the State itself in imposing liability. *Id.* What Seattle is urging this Court to do is to rewrite MTCA to include the "State" in its definition of "person" under RCW 70.105D.020(24). However, if the Legislature intended to modify the statute in this way, it certainly would have done so between the time MTCA took effect in 1989 and now.[3]

Amici place a heavy emphasis on the Department of Ecology naming DNR as a potentially liable person for the site, essentially arguing that Ecology's determination controls, and that allowing a challenge to this determination would undermine voluntary compliance under MTCA and delay cleanups. Br. of WEC at 7. However, an entity is specifically allowed to challenge its liable person status under MTCA, but it can only do so under limited circumstances, such as where it is subject to an enforcement action by Ecology, or it is in a cost recovery lawsuit brought against it.[4] In this regard, MTCA ensures that sites are expeditiously cleaned up, while still providing basic due process protections for those entities caught within its liability scheme.

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[3] Seattle also argues that local governments will be left to pay the costs of cleanup if the Court rules in DNR's favor. Br. of Seattle at 5. However, MTCA provides funding for local governments through such mechanisms as remedial action grants to cover the costs of cleanup. *See* RCW 70.105D.030(5) and WAC 173-322A.

[4] *See* RCW 70.105D.060.

Indeed, MTCA does not preclude judicial review of Ecology's determinations, and amici's suggestions to the contrary resemble those arguments advanced by the federal government in *Sackett v. Environmental Protection Agency (EPA)*, 566 U.S. 120, 132 S. Ct. 1367 (2012). In *Sackett*, EPA argued that giving an appeal right under the Clean Water Act would undermine the Act by discouraging voluntary compliance. *Id.* at 130. In that situation, as under MTCA here:

> [T]here is no reason to think that the [Act] was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . . . Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.[5]

DNR has such a substantial basis to challenge its liable person determination in this appeal, and Ecology naming DNR as a liable person does not resolve the issue of whether DNR actually is an "owner or operator" at Port Gamble; this is a legal question that is ultimately up to the Court to determine.

B. Tribal Treaty Rights Are Not at Issue, and Will Not Be Affected by the Outcome of This Appeal.

Although the Tribe argues that the Court's interpretation of MTCA will impact its treaty rights, this is not the case. Br. of Tribe at 1. The issue

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[5] *Sackett,* 566 U.S. at 130-31. Ecology has the authority to issue MTCA compliance orders under RCW 70.105D.050.

of tribal treaty rights is not before the Court in this appeal.[6] Rather, this case is primarily about the extent to which a company created by the polluter of the State's aquatic lands at Port Gamble can foist liability onto the State's taxpayers. CP at 1-10; CP at 267-80. Moreover, the Tribe's interpretation of MTCA will not lead to more expeditious cleanups; instead, it will only increase the ability of third parties to sue the State for contamination caused by polluters of the State's aquatic lands.

Under the Tribe's interpretation of MTCA, a state-agency "person" can exercise control over a site by choosing not to exercise control over that site. Br. of Tribe at 10. This interpretation is contrary to the language of RCW 70.105D.020(22)(a), which requires an "owner or operator" to "exercise[]" control over a facility before liability can attach. The Tribe's reading of MTCA would lead to the absurd result of attaching liability for exercising control over a facility by choosing not to exercise any such control. The Court should reject this argument and interpret MTCA to "avoid constructions that yield unlikely, absurd or strained consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

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[6] Similarly, the issues of any alleged "balancing test" between MTCA and DNR's aquatic lands statutes, and the extent that the policy declaration contained in RCW 70.105D.010(1) applies, are also not before the Court. Br. of Tribe at 5-11, 13. *See State v. Gonzalez,* 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised solely by amici need not be addressed by the Court); s*ee also* RAP 9.12.

Similar to the arguments of Seattle, the Tribe urges this Court to rewrite MTCA to say what it does not: that the State itself is a liable "person," and can be held liable as an "owner or operator" if one of its agencies has mere authority to control state-owned property, regardless of whether, or to what extent, that agency ever actually exercised such control. Instead of applying this strained interpretation of MTCA, this Court should look to the language of the statute and the long-standing Washington precedent of *Taliesen* and *Unigard* in interpreting DNR's "owner or operator" liability at Port Gamble. *See* DNR Suppl. Br. at 12-18.

C. It Is Undisputed That the State Itself Cannot Be a Liable "Person" Under MTCA. Because Only Amici Raise This Issue, the Court Should Decline to Consider It.

Several of the amici in this case essentially argue that the "State" itself can be a "person" for the purposes of liability under MTCA.[7] DNR has fully addressed this argument in its response to Amicus Georgia-Pacific and will only briefly reiterate here that: (1) Pope Resources does not dispute that the "State" itself cannot be a liable "person" under MTCA (CP at 308); (2) Ecology agrees with DNR's interpretation on this point (Br. of Ecology at 5 n.2); and (3) it is well established that the Court need not consider arguments raised only by amici curiae. *See Gonzalez,* 110

[7] *See* Br. of WEC at 5-6; Br. of Bricklin at 4, 8-12.

Wn.2d at 752 n.2. Although the State's exclusion from MTCA's liability scheme is not at issue, there are a few points that Amicus Bricklin raises that DNR addresses below.

Amicus Bricklin's primary argument is that MTCA was not intended to exclude the State from liability, and that the use of the term "state government agency" in MTCA's definition "person" under RCW 70.105D.020(24) is synonymous with the "State" because the State acts through its agencies. Br. of Bricklin at 4-13. These arguments ignore the reality that the Legislature has, on numerous occasions, defined the term "person" to include both the State itself, as well as a state agency or other instrumentality of the State. *See, e.g.,* RCW 70.38.025(10); RCW 79.105.060(13); and RCW 81.88.010(11). The Legislature's failure to similarly define "person" to include the "State" under RCW 70.105D.020(24) is indicative of a different statutory intent. *See State v. Jackson,* 137 Wn.2d 712, 723, 976 P.2d 1229 (1999) (when the Legislature omits certain language from a statute, it should be inferred that the omission was purposeful). This difference can only be interpreted as an intent to limit the State's liability under MTCA.

Amicus Bricklin's reliance on this Court's recent decision in *University of Washington v. City of Seattle,* No. 94232-3 (Wash. July 20,

2017) is also misplaced.[8] In *University of Washington*, the Court addressed whether or not certain UW property was subject to the City of Seattle's Landmark's Preservation Ordinance (LPO). *University of Washington*, slip. op at 1-2. In determining that the property was subject to the City's ordinance, the Court concluded that UW was a property "owner" as contemplated by the LPO because it met the specific definitions of "owner" under the City's applicable statutes. *University of Washington*, slip. op at 19. In reaching this conclusion, the Court held that "UW is a property owner *as defined by the LPO* and therefore that the LPO's own language does not preclude its application to UW property." *Id.* (emphasis added). Unlike the statutes at issue in *University of Washington*, DNR is not defined as an owner of the State's aquatic lands under the aquatic lands statutes. Accordingly, *University of Washington* is inapplicable to the facts of this appeal.

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[8] Amicus Bricklin further cites *Phillips v. King County,* 136 Wn.2d 946, 968 P.2d 871 (1998), to support its position. Br. of Bricklin at 8 n.4. However, *Phillips* involved the tort liability of King County for causing intentional damage to private property, and is thus quite different from the facts of this appeal. *See Phillips,* 136 Wn.2d at 967. In this matter, DNR never authorized the release of any hazardous substances at Port Gamble. CP at 103-06, 111-21, 268. Moreover, MTCA is not a common law tort; rather, it creates a statutory cause of action for recovery of costs from the release or threatened release of hazardous substances. *See* RCW 70.105D.080.

D. State-Owned Aquatic Lands Can Be Contaminated From Unauthorized Uses. DNR Did Not Authorize the Release of Hazardous Substances at Port Gamble and Is Not Liable as an "Owner or Operator" at That Site.

While Amici imply that DNR can limit pollution, and accordingly the State's liability, on state-owned aquatic lands through lease terms with the users of such lands, Brief of Seattle at 6, and that it can also fund cleanups through its lease terms, Brief of Bricklin at 11 n.5, the facts of the present appeal illustrate the flaws in these arguments.[9] Pope and Talbot spent well over 100 years polluting Port Gamble from operations that were not authorized by DNR. CP at 266-69. Moreover, the majority of the contamination on the site came from Pope and Talbot's mill operations in the north part of the bay, over which DNR had no authority or control. CP at 268-69, 281. DNR cannot establish lease terms to control the pollution from the operations of a mill over which DNR does not have jurisdiction.[10]

The State's 2.6 million acres of aquatic lands have become contaminated from a myriad of urban and industrial sources throughout

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[9] Amicus Bricklin argues that DNR can fund cleanups through "its lease revenues, not from tax receipts." Br. of Bricklin at 11 n.5. However, the state constitution prohibits an agency from expending funds without an appropriation from the Legislature. *See* Const. art. VIII, § 4. Moreover, all moneys received daily by DNR must be deposited into a defined account or into the State general fund. *See* RCW 43.30.325. It should be obvious that the more money the Legislature has to appropriate to subsidize polluters, the less money will be available for other spending priorities.

[10] DNR had no regulatory authority over the mill operations at the Site, as regulation of the pollution from the mill was primarily under the jurisdiction of Ecology and its predecessor, the Pollution Control Commission. CP at 269.

the State's history.[11] In addition, the public has a right to use the State's aquatic lands for "navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes . . . ." *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969). Indeed, the public "has the right to go where the navigable waters go." *Id.* The public's use of state-owned aquatic lands can also result in the release of hazardous substances. To subject the State to strict liability for contamination on 2.6 million acres of aquatic lands, regardless of any involvement of DNR in that contamination, is not supported by the plain language of MTCA and this Court should reject amici's arguments to the contrary.

III. CONCLUSION

For the foregoing reasons, DNR respectfully requests that this Court reject the arguments of amici, reverse the Court of Appeals, and

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[11] CP at 243 n.55 citing http://www.seattlepi.com/news/article/Area-s-defining-waterway-is-a-cesspool-of-1101054.php (last accessed September 4, 2017).

affirm the trial court's decision that DNR is not an "owner or operator" under MTCA at Port Gamble.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

ROBERT W. FERGUSON
Attorney General

Edward D. Callow

EDWARD D. CALLOW
Assistant Attorney General
WSBA No. 30484
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-2854
Attorneys for Petitioner
Washington State Department of Natural Resources

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 8, 2017, as follows:

David J. Ubaldi Nick S. Verwolf Robert E. Miller Davis Wright Tremaine LLP 777 108th Ave. NE, Suite 2300 Bellevue, WA 98004-5149 davidubaldi@dwt.com robertmiller@dwt.com nickverwolf3@gmail.com *Attorneys for Appellants*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Jason T. Morgan Sara A. Leverette Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 jason.morgan@stoel.com sara.leverette@stoel.com *Attorneys for Amicus Curiae Georgia-Pacific LLC*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Andrew A. Fitz Senior Counsel Attorney General's Office Ecology Division P.O. Box 40117 Olympia, WA 98504-0117 andyf@atg.wa.gov *Attorney for Amicus Curiae State of Washington, Department of Ecology*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email

Laura B. Wishik Assistant City Attorney Seattle City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7097 laura.wishik@seattle.gov *Attorney for Amicus Curiae City of Seattle*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Amy Kraham Senior Assistant City Attorney Office of the City Attorney City of Bellingham 210 Lottie Street Bellingham, WA 98225-4089 akraham@cob.org *Attorney for Amicus Curiae City of Bellingham*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Adam Rosenberg Williams, Kastner & Gibbs, PLLC 601 Union Street, Suite 4100 Seattle, WA 98101-2380 arosenberg@williamskastner.com *Attorney for Amicus Curiae Wash. Ass'n of Municipal Attys.*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Christopher D. Bacha Chief Deputy City Attorney Tacoma City Attorney's Office 747 Market Street, Suite 1120 Tacoma, WA 98402-3767 cbacha@ci.tacoma.wa.us *Attorney for Amicus Curiae City of Tacoma*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email

David A. Bricklin Bricklin & Newman, LLP 1424 Fourth Avenue, Suite 500 Seattle, WA 98101 bricklin@bnd-law.com *Attorney for Amicus Curiae Unsoeld, Niemi, and Bricklin*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Ken Lederman Foster Pepper PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101 ledek@foster.com *Attorney for Amicus Curiae Washington Environmental Council*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Michael L. Dunning Perkins Coie LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101 mdunning@perkinscoie.com *Attorney for Amicus Curiae Sierra Pacific Industries*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email
Earle David Lees, III Skokomish Legal Department Skokomish Indian Tribe N. 80 Tribal Center Road Skokomish Nation, WA 98584 elees@skokomish.org *Attorney for Amicus Curiae Skokomish Indian Tribe*	[ ] U.S. Mail Postage Prepaid [ ] Certified Mail Postage Prepaid [ ] State Campus Mail [ ] Hand Delivered [ ] ABC Legal Messenger [ ] FedEx Overnight [X] Email

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 8th day of September, 2017, at Olympia, Washington.

LISA F. ELLIS
Legal Assistant
Natural Resources Division

ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

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- nickverwolf3@gmail.com
- robertmiller@dwt.com
- sara.leverette@stoel.com
- susanbright@dwt.com

Comments:

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Filing on Behalf of: Edward David Callow - Email: tedc@atg.wa.gov (Alternate Email: RESOlyEF@atg.wa.gov)

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